Supreme Court, U.S.
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No. 86-1640

In The
Supreme Court of the United States
October Term, 1986

PACE RESOURCES, INC.,

Petitioner,

v.

SHREWSBURY TOWNSHIP, JOHN J. O'KEEFE, CLARENCE E. NACE, JOHN D. DUTTON, GILBERT G. MALONE, WILLIAM J. SOLOMON, CARL NIELSEN, RICHARD M. GRIM, RONALD McKAY and LARRY G. SPANGLER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 86-5210

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STATEMENT OF THE CASE

This case concerns a dispute between Shrewsbury Township (Township) and Pace Resources, Inc. (Pace) over industrial development in the Township. The dispute centers on what amount of land should be made available for industrial development and with what environmental standards industry should be required to comply.

In early 1979, the Township undertook a comprehensive revision of its zoning ordinance. This revision involved 52 textual amendments and numerous map changes, most of which had no relevance to Pace. Significant to this case, a total of 120 acres of total land was rezoned from industrial to agricultural. Pace owned 145 acres in the Township, of which 37 acres was subject to the rezoning. In addition, the Township created a mandatory special exception procedure requiring the adherence to certain environmental requirements before any industrial development could occur.

The agricultural district regulations established by the Zoning Ordinance would allow Pace's 37 acres to be used, not only for agricultural uses, but also for four dwelling units, and by special exception, certain specified industrial uses including "manufacturing and assembly, warehousing and storage, research and testing laboratory, building or construction contractor and carpentry, machine repair and similar shops." Pace never made any application for any of the permitted non-agricultural uses.

In December of 1978, Pace submitted a final subdivision plan for approval. This plan had a number of deficiencies, which Pace requested time to correct. Accord-

ingly, on February 7, 1979, the Township deferred action on the subdivision plan at the request of Pace so as to allow Pace time to correct these deficiencies. The plan was rejected by the Township on March 7, 1979, when the deficiencies in the plan had not been corrected. The primary deficiency was the failure of Pace to demonstrate that there would be an adequate water supply for the proposed industrial uses. None of the 1979 amendments, which formed the basis of Pace's Section 1983 complaint, were applied to reject this plan.

In the summer of 1979, Pace resubmitted its plan and obtained final approval for 18 of its 47 lots. It was for these 18 lots that Pace incurred all of its costs for roads and utilities as alleged by Pace in paragraph 48 of its Complaint.[1] Pace has made no improvements to any of the remaining 29 unapproved lots. Although the 18 lots have been approved for almost 7 years, Pace has not sought a special exception to permit industrial development on any of these approved lots.

Pace filed an appeal to the March 7 rejection of its subdivision plan. In addition, Pace substantively challenged those amendments to the Township zoning ordinance which affected its property. Further, Pace procedurally challenged the Township's enactment of its amendments to the zoning and subdivision ordinances. On December 27, 1980, the Shrewsbury Township Zoning Hearing Board dismissed Pace's challenges to the ordinances. Pace then appealed to the Court of Common Pleas of York County.

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[1]Pace's Complaint alleges $119,119.00 in site improvements (App. E, 78a) rather than $140,000.00 as set forth in its "Statement of Facts".

Pace's substantive arguments were that: The zoning amendments were invalid as special legislation; violated the comprehensive plan; represented illegal delegations of authority; constituted exclusionary zoning; constituted spot zoning; and represented a taking without just compensation with the Fifth and Fourteenth Amendments to the United States Constitution. The court rejected Pace's procedural challenges and rejected Pace's substantive challenges except that the court held that the provisions requiring a demonstration of adequacy of water supply for certain special exception uses, including manufacturing uses, were too vague to meet the requirements of the Pennsylvania Municipalities Planning Code. With respect to the appeal from subdivision plan rejection, the court held that the water supply requirements were insufficiently specific to form a basis for subdivision plan rejection under applicable state statutory law. Accordingly, the court directed the Township to reconsider the subdivision plan rejected on March 7, 1979, and to grant conditional approval of the plan, if the defects other than those related to adequacy of water supply, applying pre-1979 requisites, were found to be minor in character. Pace never resubmitted that plan for reconsideration.

Instead of using this opportunity to have its plan reconsidered without water supply requirements, Pace appealed to the Commonwealth Court of Pennsylvania and the Township cross-appealed. The Commonwealth Court sustained the Court of Common Pleas of York County except that the Commonwealth Court ruled invalid the rezoning of the 37 acres from industrial to agriculture as

spot zoning.[2] Although vigorously urged to do so by Pace, the Commonwealth Court did not find that the zoning amendments represented special legislation or an unconstitutional taking by the Township.

Pace may now use its entire property for industrial purposes within the limits of the ordinance.

During the pendency of the state litigation, Pace filed a complaint in the United States District Court for the Middle District of Pennsylvania. After the ruling by the Commonwealth Court, Pace amended its complaint to allege that the Defendants conspired to prevent the development of Pace's industrial park and that pursuant to such conspiracy, the Defendants drafted and enacted certain ordinance provisions which would have the effect of precluding industrial use of this land. (Par. 36, App. E, 75a). Pace alleged that the rezoning constituted a "taking" of Pace's property. (Par. 37, 46 and 47 of amended Complaint; App. E, 76a, 78a) and a denial of substantive due process. (Par. 38, App. E, 76a).

The United States District Court granted the Township's motion to dismiss the complaint for failure to state a claim for damages. The District Court ruled that invalidation of the offending ordinance rather than monetary damages was the exclusive remedy for zoning enactments which result in a regulatory taking or which involve a violation of substantive due process. The United States Court of Appeals for the Third Circuit held that there was neither a taking of Pace's property nor a violation of

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[2]*Pace Resources v. Shrewsbury Township Planning Commission, et al,* 89 Pa.Cmwlth. 468, 492 A.2d 818 (1985).

Pace's substantive due process rights. As a result, the Third Circuit did not reach the issue of whether damages was an appropriate remedy.

SUMMARY OF ARGUMENT

Pace's Petition for Certiorari fails to demonstrate that this is an appropriate matter for review by this Court pursuant to the considerations set forth in Rule 17 of the Supreme Court Rules. The decision of the Court of Appeals for the Third Circuit correctly found that neither a taking nor a substantive due process violation had occurred. Pace's petition does not allege that the Court of Appeals resolved any federal law question in a manner so as to conflict with any decision of any other court of appeals or a state court of last resort. Pace does not establish that the Court of Appeals' resolution of the "taking" and "substantive due process" issues represented a departure from the accepted and usual course of judicial proceedings, involved important but unresolved questions of federal law, or were in conflict with decisions of this Court.

The issue of the availability of damages as a remedy for a temporary regulatory taking or a land use substantive due process violation was not ruled upon by the Court of Appeals and thus is not ripe for review by this Court.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED ON THE ISSUE OF AVAILABILITY OF DAMAGES AS A REMEDY FOR TEMPORARY ZONING ACTION WHICH VIOLATES CONSTITUTIONAL PROTECTIONS.

Pace cannot benefit from a ruling that damages are a remedy for temporary zoning action violative of constitutional protections, since the Court of Appeals held that there was no unconstitutional zoning action by the Township. While the issue of whether damages, as opposed to invalidation, can ever be a remedy in a case involving the temporary unconstitutional zoning of land was left open by this Court in its decisions of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 105 S.Ct. 3108 (1985) and *MacDonald, Sommer and Frates v. Yolo County,* 106 S.Ct. 2561 (1986), this issue is not presented in this case. Although the District Court did dismiss Pace's claims based upon the unavailability of such a remedy, the decision of the Third Circuit that there was no unconstitutional zoning action, precludes the award of any damages to Pace.

Moreover, any damage action Pace would have is precluded because Pace never established during the state litigation what use it could make of its land. Pace never applied for any of the permitted residential uses, for any of the specially permitted industrial uses, or for any other non-agricultural use on its 37 acres which had been rezoned agricultural. This Court has emphasized that "[u]ntil a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain(s) any reasonable beneficial use or whether [existing] expectation interests ha[ve] been

destroyed." *MacDonald, Sommer & Frates v. Yolo County, et al, supra* at 2566 (quoting, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra* at 3116, 3118, n.11). In *MacDonald,* this Court indicated that it would insist "on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." 106 S.Ct. at 2567. Pace had applied for such an intense development of its property that the Township concluded that such development could not be supported by the existing underground water supply. At no time did Pace ever apply for any of the less intensive uses permitted in an agricultural zone, nor did Pace modify its proposal so as to reduce the intensity of its development to a level consistent with the Township's determination of the available water supply.

Finally, the existence of a damage remedy for an unconstitutional rezoning is irrelevant unless some development that could have occurred in the absence of such rezoning is precluded by it. It was the Township's determination that Pace lacked sufficient ground water supply to permit it to develop its property to the intensity it desired. The Township's determination of water availability could not permit the development of all of the 108 acres remaining in the industrial classification in the manner envisioned by Pace much less the 37 acres rezoned by the Township. The water availability issue was resolved at the same time as the rezoning issue. Thus there was never a point in time that that rezoning in and of itself acted to preclude Pace's development activity. At no time has Pace ever alleged that had the Township's interpretation of its water availability requirements been codified it would have been unconstitutional.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE THIRD CIRCUIT'S FINDING THAT THERE WAS NO UNCONSTITUTIONAL TAKING.

Pace alleged both in the state court system and in the district court that the rezoning of the 37 acres constituted an unlawful taking without just compensation. No court which has reviewed this issue has ruled in favor of such a claim. The Court of Common Pleas of York County held: "We find that there has been no taking of Pace's land without just compensation in derogation of the Fifth and Fourteenth Amendments to the United States Constitution." *Pace Resources, Inc. v. Shrewsbury Township Planning Commission, et al*, 79-S-1034, 81-S-277 (March 12, 1984) *quoted in* 808 F.2d at 1027, App. B, 30a. This finding was not disturbed by the Commonwealth Court on appeal. Contrary to the assertion by Pace in its brief, the United States District Court for the Middle District of Pennsylvania did not rule on whether or not a taking occurred, but rather concluded that even if such a taking had occurred, damages were not an appropriate remedy. App. A, 8a; *See* 808 F.2d at 1028; App. B, 32a. The Third Circuit undertook a factual analysis of Pace's complaint and determined from those facts that no taking had occurred. Since the Third Circuit determination of whether or not a taking had occurred involved a factual analysis, its application of federal legal principles in this case does not involve a clear issue of federal law such as is envisioned by Rule 17 of the Rules of the Supreme Court of the United States as a basis for granting certiorari. Pace, in its petition, has not identified any federal court of appeals or any state court of last resort opinion which has decided this issue in a manner different from the ruling of the Third Circuit. Pace has not identified "an important question of

federal law which has not been, but should be, settled by this Court'' or that the Third Circuit, ''has decided a federal question in a way in conflict with applicable decisions of this Court.'' Sup.Ct.R. 17.1(c).

Although Pace in paragraph 37 of its Complaint alleged a taking without just compensation, (App. E, 78a), such allegation is purely conclusory and is not supported by adequate factual allegations. Pace has never alleged that following rezoning, its property was unsuited for any of the uses permitted by the zoning or that as a result of the rezoning its property had no value or only a distress value for any permitted purpose.

The test of ''taking'' is not whether the zoning ordinance denies the owner the most economically appropriate use of his property, but whether the ordinance permits him any reasonable use of his land. *Penn Central Transportation Company v. New York City*, 438 U.S. 105, 125 (1978). The fact that the impact of the regulation has brought about a reduction in the value of Pace's property or that some more profitable use could be made of Pace's property than that permitted by the ordinance is insufficient to establish a ''taking''. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadachek v. Sebastian*, 239 U.S. 394 (1915).

Assuming that the reduction in value of a property is quite substantial, there is no taking if there remains a reasonable residual value in the land for permitted uses. In *Village of Euclid v. Ambler Realty Co., supra,* the reduction in value was from $10,000.00 per acre to $2,500.00 per acre. In *Hadachek v. Sebastian, supra,* the reduction in the total value of the land was from $800,000.00 to $60,000.00.

Nowhere in Pace's complaint did it allege that its land cannot be reasonably used for agricultural purposes. In fact, the 37 acres rezoned agriculture is suitable for that use and has been farmed since purchased by Pace. 808 F.2d at 1031; App. B, 38a n.4.

Shrewsbury Township's ordinance provisions relating to the agricultural district have been upheld by the Supreme Court of Pennsylvania, *Boundary Drive Associates, Inc. v. Shrewsbury Township,* 507 Pa. 481, 491 A.2d 86 (1985), as an appropriate means for carrying out the legitimate governmental goal of farmland preservation insofar as they apply generally throughout the Township and the limitations on uses generally applied in that district clearly do not constitute a taking. While in this case the Commonwealth Court determined that the placing of Pace's 37 acres in an agricultural zone represented spot zoning because it was surrounded by land with other zoning classifications (it being adjacent to residential, industrial and conservation zoned land but not immediately adjacent to any agriculturally zoned land), there is nothing inherently confiscatory in such a zoning classification. Agriculture is a permitted use and the owner of a 37-acre tract is permitted four dwellings and numerous other uses including industrial uses by special exception.

Pace admits that the property has a value of over $1,400.00 per acre for agricultural uses. (Par. 47, App. E, 78a). Such a value does not constitute a distress value or a value rendering the property practically worthless. As pointed out by the Third Circuit in its opinion, the $1,400.00 value compares favorably with Pace's original $515.07 per acre investment. 808 F.2d at 1031, App. B, 38a n.4.

Pace's 37 acres, like most land in the Township, was placed in the agricultural district. While possibly this land did not have as much value as it would have had in the industrial zone,[3] Pace was not forced to have its land adversely affected relative to other lands in the community. The rationale of the dissenting opinion in *San Diego Electric Co. v. San Diego,* 450 U.S. 621, 636-661 (1981), supporting the award of damages in "regulatory taking" cases was that the government should not force some individuals to bear burdens which in all fairness should be borne by the public as a whole. Pace's situation was the converse. In having any of its land zoned industrial it was receiving a benefit not received by landowners generally.

Finally, Pace was not without a full and complete remedy under state law. If there was something unique with respect to Pace's land which rendered it economically unuseable for the uses permitted in the agricultural district, Pace could have submitted an application for a variance pursuant to Section 14.12 of the Township zoning ordinance which restates Section 912 of the Pennsylvania Municipalities Planning Code. (53 P.S. § 10912). The granting of a variance is appropriate when an otherwise valid ordinance when applied to a particular tract of land is confiscatory. *A & D, Inc. v. Zoning Hearing Board, East Nottingham Township, Chester County,* 32 Pa.Cmwlth. 367, 379 A.2d 654 (1977). Pace never made any application for a variance under state law.

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[3]Pace's estimate of the value of industrially zoned land in Shrewsbury Township is vastly exaggerated. Expert testimony before the Zoning Hearing Board indicated the value of Pace's land if zoned industrial at $1,721.00 per acre, only slightly above its agricultural value. Pace's valuation analysis was based upon expected gross lot sales without subtracting either development costs or selling costs.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE THIRD CIRCUIT'S FINDING THAT NO SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED.

Pace argued also that some of the Township activities violated its substantive due process rights. All of such claims were rejected by the District Court with one exception. The District Court felt compelled to consider the rezoning of the 37 acres as a substantive due process violation because the Commonwealth Court of Pennsylvania had found such rezoning to be invalid as "spot zoning" even though the Commonwealth Court, in its opinion, never made any reference to federal constitutional provisions. The Commonwealth Court characterized the rezoning as "arbitrary and unjustifiably discriminatory"[4] but did not indicate whether its determination of invalidity resulted from a finding that the rezoning exceeded the powers granted the Township by the enabling statute, violated state constitutional requirements, or violated federal constitutional requirements. Because the Commonwealth Court's review, if intended to be of federal due process law, was, as is shown below, clearly erroneous, it should be presumed that the review was based on state constitutional or statutory requirements.

The Court of Appeals ruled that the District Court had erred in finding that the Commonwealth Court's ruling of invalid spot zoning compelled a finding of a violation of federal substantive due process. Rather, the Court of Appeals determined that it, "must look instead to whether,

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[4]Such characterizations do not necessarily refer to federal constitutional requirements. They may involve state constitutional requirements or even state statutory requirements. *See Couf v. DeBlaker,* 652 F.2d 585, 589 (5th Cir. 1981).

given the facts alleged in the amended complaint, the Township could have had a legitimate reason for its decision." 808 F.2d at 1035, App. B, 46a.

Pace, in its petition for a writ of certiorari, has abandoned all of its original substantive due process claims other than the claim concerning the rezoning of its 37 acres.

Though this singular claim does present a legal issue, Pace has not identified any federal court of appeals which has rendered a decision in conflict with the Third Circuit. Pace has also not identified a state court of last resort which has decided a federal question in such a way as to conflict with the decision of the Third Circuit on such federal question. Finally, Pace has not established that this issue is an unsettled but important question of federal law which should be settled by this Court.

Without so stating, Pace is asking this Court to reverse its decision in *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981), where this Court held that state court determinations that state legislation violated the Equal Protection and Due Process Clauses were not determinative in the federal system. Each state of the union, including Pennsylvania, has its own constitutional provisions which guarantee substantive due process. Each state's own court of last resort is the final interpreter of that state's constitutional provisions. As this Court stated in footnote 6 to its opinion in *Minnesota v. Cloverleaf Creamery Co., supra*, at 461:

> A state court may, of course, apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection or Due Process Clauses . . . . but when a state court

> reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed. *Oregon v. Hass*, 420 U.S. 714, 719, 43 L.Ed. 2d 570, 95 S.Ct. 1215 (1975).

The contrast between Pennsylvania due process law and federal due process law illustrates the differing standards of scrutiny. Pennsylvania substantive due process law requires the "reviewing court to balance the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights." *Boundary Drive Associates, Inc. v. Shrewsbury Township,* 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). In *Hopewell Township Board of Supervisors v. Golla,* 499 Pa. 246, 452 A.2d 1337 (1982), the Supreme Court of Pennsylvania stated that:

> The function judicial review, when the validity of a zoning ordinance is challenged, is to engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner's freedom thereby incurred. A conclusion that an ordinance is valid necessitates a determination that the public purpose served thereby adequately outweighs the landowner's right to do as he sees fit with his property so as to satisfy the requirements of due process . . . Although zoning almost always has a worthwhile objective, since it is a restriction on and a deprivation of a property owner's constitutionally ordained rights of property, it can be sustained only if it is clearly necessary to protect the health or safety or morals or general welfare of the people.

Id. at 256, 452 A.2d at 1342.

As pointed out by the Court of Appeals, the rule of law as applied by the Commonwealth Court in this case,

"bears no resemblance to any aspect of federal due process law" 808 F.2d at 1034, App. B, 44a. It even placed on the Township the burden of proving the requisite relation to "public health, safety and welfare". 808 F.2d at 1035, App. B, 46a, referring to Commonwealth Court opinion at 89 Pa.Cmwlth. at 475, 492 A.2d at 821, App. C, 59a.

This state standard of inquiry is far different from the standard of inquiry which this Court has directed be followed. As the Third Circuit pointed out in *Rogin v. Bensalem Township,* 616 F.2d 680 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029 (1981), at one time the Supreme Court applied a standard similar to what continues to be applied by the State of Pennsylvania. The Supreme Court was:

> willing to question the fairness and wisdom of a particular state statute and despite disclaimers to the contrary, to substitute its judgment about social policy for that of the legislative body. If the statute, in the court's opinion did not further the public interest in safety, morals or welfare, the law was held to exceed the authority of the legislature and therefore to abridge the liberty and property protections of the due process clause. In more recent years, the court has abjured this supervisory role, however, and now applies virtually the same standard of review under the due process clause or it does in equal protection cases involving economic classifications. The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. 'The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and it might be thought that the particular legislative measure was a rational way to

> correct it. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955).'

Id. at 689.

Under federal law, the burden of proof is not on the municipality. As the Court of Appeals correctly pointed out, it is the plaintiff making a substantive due process claim who has the burden of showing that the regulation is irrational and that the municipality could not have had a legitimate reason for the legislative decision. 808 F.2d at 1035, App. B, 46a. *See also Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986) *cert. denied*, 106 S.Ct. 3276 (1986) and 107 S.Ct. 89 (1986) (extensive discussion regarding the different standards for substantive due process review for federal constitutional law violations and by some state court systems for violations of their constitutional mandates).

Significantly most states, including Pennsylvania, do not provide a damage remedy for substantive due process violations involving land use policy. Thus, the closer scrutiny of zoning provisions on the state level does not have the effect of inhibiting innovative legislative activity. *See* Sterk, *Government Liability for Unconstitutional Land Use Regulation*, 60 IND. L.J. 113, 136, 139 (1985). The reduced due process scrutiny permitted by the federal court system would substantially reduce the occasions for a damage remedy should one ultimately be permitted by this Court. However, should this Court ultimately permit a damage remedy and permit state court due process determinations to be conclusory for federal purposes, the fact situation which would permit a federal monetary recovery would vary greatly from state to state depending

on the level of due process scrutiny applied by the state's judicial system. This would create a situation where a landowner would try to assert a due process claim in state court, and after the state court had determined that such a violation had occurred, the landowner would then assert his damage claim in federal court, even though his due process claim would not prevail if originally presented in federal court.

As the Third Circuit correctly concluded, applying federal due process law, it was rational for the Township to desire to restrict industrial presence in the Township. 808 F.2d at 1036, App. B, 49a. The Third Circuit concluded that the reduction in the size of the industrial district was a rational means of accomplishing that objective. 808 F.2d at 1036, App. B, 49a.

Pace, in its petition, emphasizes that the ordinance amendments were promoted by citizens who were concerned as to its impact on them. Most legislation occurs as a result of the citizenry bringing to the attention of the elected officials those problems and concerns which the citizenry feels should be remedied. The Township citizens in this case were given far less than they wanted. They wanted the entire industrial zone in their portion of the Township eliminated. The Board of Supervisors made a finding which it felt was reasonable under all the circumstances.

The Commonwealth Court was incorrect when it said that "the rezoning of Pace's land to 'agriculture' was accomplished by the Board of Supervisors in only an hour from the introduction of the ordinance to its final passage." 89 Pa. Cmwlth. at 475, 492 A.2d at 821, App. C, 59a. In its own brief to the Commonwealth Court, Pace asserted

in its Statement of Facts that the decisions ultimately articulated in the ordinance amendments were largely arrived at during an all-day meeting on January 9, 1979. App. F, 84a-85a. Following such meeting, drafts of the proposed ordinance were prepared by the Township Solicitor and made available for review by the Township Planning Commission at its January meeting. The Planning Commission recommended the changes to the Board of Supervisors, which reviewed the changes at its February meeting. The Board of Supervisors directed that the proposed ordinance be advertised for a public hearing on March 7, 1979. The public meeting resulted in several minor revisions which were recommended and placed in final form for enactment on March 12, 1979. During this time, the proposed ordinance was presented to the York County Planning Commission for its review by a letter from the Township dated January 29, 1979, a portion of which letter is referred to by the Third Circuit in its Opinion. App. B, 48a.

The Township zoning amendments intended to reduce the amount of land zoned for industrial uses and to insure that any industrial use would comply with strict environmental standards. This would make industrial development more difficult for Pace as well as for others who owned industrially zoned property. Some property, except for light industrial uses permitted by special exception in the agricultural district, would be unavailable for any industrial use.

These actions were not taken as a result of any animosity directed at Pace or for any personal financial gain for those who enacted the regulation. 808 F.2d at 1026, App. B, 27a-28a. These actions occurred in furtherance of

what those who enacted the regulations believed (rightly or wrongly) constituted the furtherance of the best land use planning goals for the Township. These goals were to preserve prime agricultural land and to limit industrial development to that amount which the Township reasonably believed to be needed by the Township and to guarantee that such development as did occur was limited to high quality, clean industry without undesirable environmental side effects. That the rezoning did not significantly change the total amount of lands zoned agricultural, does not mean that the Township's rezoning was not rationally related to its goal. The zoning amendments changed the agricultural district so that more high quality agricultural land was brought into the district and to compensate land of lower quality for agricultural use was made available for development uses, in particular, residential development. The Township's commitment to agricultural preservation is evidenced by its successful defense of its innovative agricultural preservation provisions in the state court system through the Supreme Court of Pennsylvania. *Boundary Drive Associates, Inc. v. Shrewsbury Township, supra.* A review of Pace's Statement of Facts presented to the Commonwealth Court of Pennsylvania, which Pace claims the Third Circuit failed to consider as an amplification of the allegations in its complaint, reveals nothing which detracts from the fact that the Township's actions were rationally related to its legitimate goals.

Finally, Pace attempts in its petition to raise a procedural due process claim which it failed to raise in its complaint. Pace was not denied its procedural due process rights. Pennsylvania law concerning the enactment of

zoning ordinance amedments provides that prior to voting on such an enactment of a zoning ordinance amendment, the govering body must hold a public hearing pursuant to public notice. A proposal must be submitted to a county planning agency at least 30 days prior to the hearing. Pennsylvania Municipalities Planning Code, Section 509, (53 P.S. § 10609). Nowhere in its complaint does Pace allege that this Pennsylvania procedure for the enactment of zoning ordinance amendments represents a denial of procedural due process, nor does Pace allege that such procedure was not followed in this case.

The amendments to the Township ordinance involved over 50 textual changes and numerous map changes. Virtually everyone in the Township, not only Pace, was affected by one or more of these changes. A requirement of individual notice would have been totally unworkable. Apart from those affected by the textual amendments and those whose lands were changed from residential to agricultural or vice versa, there were property owners other than Pace whose land was rezoned from industrial to another classification.

As pointed out by the Court of Appeals, this case is remarkably similar to that which confronted the Court of Appeals for the First Circuit in *Creative Environments, Inc. v. Esterbrook,* 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982). In that case, the plaintiffs complained that the town "motivated by parochial views of local interest" had violated due process, "in order to protect 'the town's basic character' ". 808 F.2d at 1036, App. B, 49a. The Court of Appeals quoting from the opinion of the First Circuit in *Creative Environments, Inc. v. Esterbrook, supra,* at 833 stated that, "Such a claim is too typi-

cal of the run of the mill dispute between a developer and a town planning agency regardless of [plaintiff's] characterizations of it and of defendants alleged mental states, to rise to the level of a due process violation". *See also Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983).

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CONCLUSION

The Court of Appeals correctly determined that there was no taking under the Fifth and Fourteenth Amendments and no substantive due process violation of the Fourteenth Amendment and therefore did not reach the remedy issue. The Court of Appeals rulings are consistent with prior rulings of this Court and with the other federal courts of appeal. The Court of Appeals decision is not in conflict with the decision of any state court of last resort with respect to any federal constitutional question. No important but unresolved issues of federal law are presented.

Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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